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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street SW
Washington, DC 20554

Re: Wireline Infrastructure, WC Docket No. 17-84

Dear Ms. Dortch,

NCTA – The Internet & Television Association (NCTA) submits this letter in response to recent submissions by the Fiber Broadband Association, INCOMPAS, and Google Fiber.[1] For the reasons discussed below, these letters provide no basis for shielding new attachers from bearing responsibility for the consequences of work performed by their contractors. The *Draft Third Report and Order* should be revised accordingly.[2]

As NCTA has explained, in the event a contractor performing one touch make-ready (OTMR) damages an existing attacher's facilities or causes an outage of an existing attacher's network, there is absolutely no reason why the new attacher should not bear responsibility for its actions.[3] As between the new attacher, which selects the contractor and performs the work, and the existing attacher, which is prevented by the proposed OTMR rules from doing the work or selecting the contractor, these letters provide no cogent response as to why the new attacher should not bear *all* responsibility for the consequences of this make-ready work.

Rather than address this fundamental policy concern, the letters suggest that the consequences of such an approach are so dramatic that they would essentially preclude new

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1 *See* Letter from Lisa Youngers, Fiber Broadband Association, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed July 20, 2018) (FBA Letter); Letter from Karen Reidy, INCOMPAS, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed July 22, 2018) (INCOMPAS Letter); Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed July 23, 2018) (Google Letter).

2 *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, FCC-CIRC1808-03 (rel. July 12, 2018) (*Draft Third Report and Order*).

3 Letter from Steven F. Morris, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed July 18, 2018) (NCTA July 18 Letter). *See also* Letter from Nicholas G. Alexander, CenturyLink, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed July 23, 2018).

entrants from choosing OTMR.[4] As a threshold matter, if the only way OTMR can be made attractive is to relieve new attachers of responsibility for work performed by their chosen contractors, that should be a giant red flag to the Commission. If a company wants the benefits that purportedly will flow from having complete control over the make-ready process, there is no legal or policy basis for shielding it from bearing complete responsibility for its work. If a company is unwilling to bear that responsibility, it should allow existing attachers to move their own facilities under the Commission's non-OTMR rules.

Moreover, the effect of requiring a new attacher to indemnify an existing attacher is almost certainly overstated. Even under the OTMR regime proposed in the *Draft Third Report and Order*, new attachers *already* would bear the risk that they will have to indemnify the pole owner for damage to its facilities or outages of its services.[5] If a new attacher must indemnify an incumbent LEC for damages when the LEC owns the pole, there is no reason why a requirement to provide similar indemnification to a LEC or a cable operator when the electric company owns the pole would cause a new entrant to forego the purported benefits of OTMR. Nor is there any reason for this disparate treatment based solely on pole ownership.

Furthermore, as explained in the *Draft Third Report and Order*, any company doing construction work on the poles necessarily must carry insurance to cover precisely these kinds of risks.[6] There has been no suggestion in the record, let alone any evidence, that the increased insurance cost attributable to indemnifying existing attachers, above and beyond the indemnification to the pole owner, would be a material factor in a new attacher's deployment strategy. And as noted above, if a requirement to accept responsibility for the consequences of work performed by a contractor is the tipping point between using OTMR and not using it, then the new attacher should let existing attachers move their own facilities under the Commission's non-OTMR rules.

For all of these reasons, the Commission should revise the discussion of these issues that appears in the *Draft Third Report and Order*. That discussion repeatedly refers to contractual remedies that simply do not exist between a new attacher and an existing attacher in the OTMR regime that has been proposed.[7] It also asserts without analysis or citation that state tort law is sufficient to address an existing attacher's concerns,[8] but there is no discussion of the possible impact that creation of a federal right to move facilities owned by another party might have on state law claims. Nor does the Commission explain why it is deferring to state law in the context

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4 FBA Letter at 3; INCOMPAS Letter at 1; Google Letter at 1. Google Fiber goes still further to claim that new attachers also should not bear any costs incurred by existing attachers' participation in the OTMR survey and make-ready process to protect their networks from damage. Google Letter at 2. Such an approach cannot be supported even under the overly narrow interpretation of Section 224(i) proposed in the draft item and should be rejected.

5 *Draft Third Report and Order* at ¶ 68 n.223.

6 *Id.* at ¶ 67 n.220.

7 *Id.* at ¶¶ 68-70.

8 *Id.* at ¶ 68 n.224.

of a regime that relies on a federal statute to create a new federal rule providing new attachers with the right to move existing facilities.

Because it is the Commission's decision to create a new federal right with no requirement of contractual privity that creates questions about liability for the consequences of make-ready work, it also should be the Commission's responsibility to provide an explicit federal right to indemnification under Section 224(i). The suggestion in the draft item that deferring to states on indemnification somehow avoids a "broad federal regulatory intrusion" cannot be reconciled with the highly intrusive federal regime this order would create.[9] Moreover, if an existing attacher does pursue any remedies it may possess under state tort law, the Commission should make clear in the *Draft Third Report and Order* that its OTMR regime does not in any way limit the rights of existing attachers or absolve new attachers of responsibility for their actions in state court.

Respectfully submitted,

/s/ Steven F. Morris

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cc: Jay Schwarz
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[9] *Id.* at ¶ 68